

IN THE  
UNITED STATES  
COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA, for the  
use of Westinghouse Electric Supply  
Company, a corporation and all  
similarly situated,

*Appellant,*

vs.

JOHN V. AHEARN, SR., an individual  
doing business under the firm name  
and style of Ahearn Electric Com-  
pany and THE AETNA CASUALTY AND  
SURETY COMPANY, a corporation,

*Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

EVANS, McLAREN, LANE,  
POWELL & BEEKS  
W. BYRON LANE  
MARTIN P. DETELS, JR.

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**BRIEF OF APPELLANT**

**STATEMENT OF JURISDICTION**

This is an appeal from a final judgment of the  
District Court for the Western District of Wash-  
ington, Northern Division, dismissing with preju-  
dice the complaint of the plaintiff, appellant herein,

United States of America for the use of Westinghouse Electric Supply Company (Tr. 25-6).

The complaint pleaded the existence of an express contract for the purchase from the use-plaintiff of certain latex-insulated telephone cable by the individual defendant, John V. Ahearn, Sr., used by him in the prosecution of work under a contract with the United States Government, and asserted a balance of \$5,469.51 with interest due on such contract. Recovery was sought against the individual defendant, as principal, and the corporate defendant, Aetna Casualty and Surety Company, as surety, on a payment bond furnished to the federal government, as required by the Miller Act, 40 U.S.C. Sec. 270a, 49 Stat. 793. (Complaint Tr. 3).

The jurisdiction of the District Court was conferred by Title 40 U.S.C., Sec. 270b, 49 Stat. 794, creating a cause of action in favor of laborers and materialmen upon a payment bond furnished to the federal government, and Title 28 U.S.C., Sec. 1352, 62 Stat. 934, conferring on federal district courts jurisdiction of actions on bonds executed under the laws of the United States. The District Court also had jurisdiction of this action under Title 28 U.S.C., Sec. 1345, 62 Stat. 933, conferring jurisdiction of actions commenced by the United States; under Title 28 U.S.C., Sec. 1331, 62 Stat. 930, conferring jurisdiction where the matter in controversy ex-

ceeds \$3,000.00 and arises under the laws of the United States; and under Title 28 U.S.C., Sec. 1332, 62 Stat. 930, conferring jurisdiction of civil actions where the matter in controversy exceeds \$3,000.00 and is between citizens of different states. The jurisdictional facts appear in the Complaint (Tr. 3-9).

The jurisdiction of this Court to review the judgment of the District Court is conferred by Title 28 U.S.C., Sections 1291 and 1294, 62 Stat. 929 and 930.

### STATEMENT OF THE CASE

The use-appellant in this Court, use-plaintiff in the court below, Westinghouse Electric Supply Company, hereinafter called Westinghouse, is a corporation organized under the laws of the State of Delaware and at all times herein mentioned was authorized to do business in the State of Washington, (Finding of Fact I, Tr. 13-14).

Defendant, John V. Ahearn, Sr., hereinafter called Ahearn, is a resident of Washington, doing business under the firm name and style of Ahearn Electric Co. in Bremerton, which is in the Western District of the State of Washington, Northern Division. Defendant, The Aetna Casualty & Surety Company, hereinafter called Aetna, is a corporation organized under the laws of the State of Connecticut and is authorized to do business in the

State of Washington. (Finding of Fact I, Tr. 14).

The complaint alleged an express contract between Westinghouse and Ahearn for the purchase by the latter of certain latex telephone cable (Paragraph IV, Tr. 5-6), and claimed a balance due thereon of \$5,469.51, with interest thereon (Par. V, Tr. 6) plus reasonable attorneys' fees and costs. The answer denied the existence of the contract, and denied any indebtedness to the plaintiff (Par. III and IV, Tr. 8-9).

The evidence is reviewed in detail with record references below. For the convenience of the Court, the contentions of the parties are summarized as follows: The evidence introduced by Westinghouse, if believed, tended to show that an express contract had been made between Westinghouse and Ahearn for the purchase of certain paper wrapped telephone cable to be delivered in the third quarter of 1953; that delivery of the paper wrapped cable could not be had in time for Ahearn to perform his contract with the Federal Government; that Ahearn had then ordered latex cable which could be delivered one year earlier; that latex cable was delivered and utilized by Ahearn in the performance of the government contract with knowledge of the increased price thereof; and that Ahearn paid only the amount he thought the paper wrapped cable should have cost, leaving a balance due of \$5,469.51, being

the difference between the price of the paper wrapped and latex cable in the quantity delivered.

The defendants' evidence, if believed, tended to show that Ahearn ordered paper wrapped cable but had never ordered the latex cable; that he had been orally promised by a Westinghouse employee that the paper wrapped cable would be delivered in time for him to perform his government contract approximately one year earlier than the date of delivery shown by a written estimate of Westinghouse and a later letter from Westinghouse which confirmed the same delivery date for paper wrapped cable as specified in the written estimate; that he had received and used the latex cable in the prosecution of work under his government contract, but had never admitted his liability therefor.

The District Judge found the evidence conflicting and that the plaintiff had not sustained its burden of proving an express contract for the supply of latex cable (Finding of Fact XI, Tr. 22-3). This finding is not attacked on appeal due to conflicting testimony. Rather, appellant contends that upon the following undisputed facts, there was established an implied contract for the purchase of latex cable:

(1) That the latex cable was received and accepted by the defendant Ahearn, he having possession about three weeks before using the same;

(2) With knowledge of the price which Westinghouse placed thereon by an invoice received by Ahearn before the delivery of the cable;

(3) Which price represented its reasonable value, being its cost to Westinghouse plus a 5% commission.

Appellant's position is that the foregoing circumstances establish the existence of a contract implied-in-fact to pay the reasonable value of the latex cable, and that, in addition, defendant Ahearn received benefit from his receipt and use of the latex cable, giving rise to a contract implied-in-law.

It is the further contention of appellant that having proven that it had "furnished material in the prosecution of the work" under the government contract, and not having been paid in full therefor, it became entitled, under Title 40 U.S.C. Section 270 b, 49 Stat. 794, to recover the balance due thereon.

A detailed summary of the evidence follows:

Some time prior to January 30, 1952, the federal government acting through the Navy Department, issued Specification No. 30338 for the performance of certain electrical repairs at the Puget Sound Naval Shipyard, Bremerton. (Def. Ex. A-3). Bids were required to be submitted in Seattle, Washington, on February 1, 1952 at 2 P. M. (Ahearn Tr. 146). Section 5.09 of this Specification provided in part as follows with reference to telephone cable

(Def. Ex. A-3):

"Telephone cable shall be 6, 26 and 51 pair, No. 19 AWG solid annealed bare copper with single wrap dry paper or .015 latex insulation, twisted pairs, cable pairs, string binder, five tapes for paper belt or rubber fill tape, and lead sheath."

On January 31, 1952, plaintiff's employee, George F. Schindler, at the request of Ahearn's foreman Rockwell, prepared a quotation for supplying materials required in the performance of his Navy contract. Rockwell requested a quotation on paper wrapped cable alone, as the cost of latex cable was several times the cost of paper wrapped cable (Rockwell, Tr. 131-2). This quotation was received in evidence as Pl. Exhibit 3. With reference to the supplying of telephone cable which forms the subject matter of this suit, Ex. 3 provides as follows:

"Approx. 1500'	Telephone Cable, 6 pair, 19 ga. paper wrapped, lead covered, Western Electric Type ENB 16.50C'
-------------------	--

"Approx. 1500'	Ditto except 26 pair	37.90C'
-------------------	----------------------	---------

"Approx. 1500'	Ditto except 51 pair	61.20C'
-------------------	----------------------	---------

Shipment - Telephone Cable - 3rd  
Quarter. 1953 Prices billed will be  
those in effect at time of shipment.

Orders on Telephone Cable should be  
placed direct with Graybar Electric  
Company, Seattle."

The testimony of plaintiff's employee, Schindler, was that he telephoned the information from the quotation to someone at the Ahearn Electric Co., on January 31, 1952. He then placed it in the mail addressed to the Ahearn Electric Co. on the following day. (Schindler, Tr. 33). Defendant Ahearn testified that the quotation was delivered to him by plaintiff's salesman Merritt Upson on January 31, 1952 at his place of business in Bremerton (Ahearn Tr. 147-150) and that Upson then assured him in the presence of Mrs. Ahearn and Arthur Rockwell, Ahearn's foreman at that time, that the paper-wrapped cable could be delivered in time for Ahearn to complete the Navy contract by August, 1952, in contradiction to the written terms of the Westinghouse quotation, Exhibit 3, which specified third quarter 1953. On redirect examination, Upson testified that he had been in Port Angeles, Washington on January 30 and 31 of 1952; that he had spent the night of January 30 there, and that he had returned from Port Angeles to Seattle via a route which did not go through Bremerton, on the afternoon of January 31, to take three guests from Port Angeles to a Westinghouse demonstration that evening. He denied that he had been in the defendant Ahearn's place of business on January 31, or that he had presented Exhibit 3 to Ahearn and denied on cross-examination that he had discussed

the Navy Yard job with Ahearn prior to the time of Ahearn's bid, in person or by telephone (Upson, Tr. 202-208). Previously when Upson's pre-trial deposition was taken he had testified he did not remember whether the specifications were mailed or delivered to Ahearn, (Upson, Tr. 207-208), but at that time he did not have his daily records and expense account with him. Upson's running daily expense account and his monthly expense statement covering the period January 30-31, 1952, were received in evidence as Plaintiff's Exhibits 21 and 22. Attached thereto was a receipted bill for his hotel expense at Port Angeles the night of January 30. Ahearn's foreman on the Navy Yard job, Arthur Rockwell, examined as a witness for the plaintiff, testified that he had requested the Westinghouse quotation from Mr. Schindler of Westinghouse, and that it had been received in the mail, rather than delivered in person (Rockwell, Tr. 131-2).

Defendant Ahearn was the successful bidder on the Navy Yard job (Finding of Fact VI, Tr. 17), and was awarded the government contract (Contract No. NOY 29688), a copy of which was received in evidence as plaintiff's Exhibit 18 (Finding of Fact III, Tr. 14-15). In conjunction with the award of the contract, there was furnished to the United States of America by Ahearn as principal and by Aetna as surety, under date of February 8,

1952, a payment bond in the sum of \$29,069.43, conditioned on payment by the principal to all persons supplying labor and materials for the performance of the contract. (Finding of Fact III, Tr. 15).

On February 5, 1952, an order was taken by plaintiff's salesman Upson from defendant for electrical materials required for the Navy Yard job, covered by the quotation, plaintiff's Exhibit 3, at Ahearn's place of business in Bremerton (Finding of Fact VI, Tr. 17-18). This order, signed by Ahearn, is in evidence as plaintiff's Exhibit 4, and with reference to telephone cable, specified as follows:

"1900' 6 pr. 19 Ga. Paper wrapped Lead covered	
Western Electric Type	
E. N. B. Wire	\$16.50C
1700' 26 pr. Ditto	37.90C
1100' 51 pr. Ditto One piece	61.20C"

The order does not refer to delivery dates, either of telephone cable or of other materials. It contains no reference to latex covered cable.

Exhibit 4 was rewritten in the Westinghouse office and a copy of the rewrite was received in evidence as Pl. Ex. 5. Plaintiff's salesman Upson testified that he mailed a copy of Exhibit 5 to Ahearn, but no copy thereof was produced by Ahearn at his pre-trial deposition, or at the trial, in response to a subpoena therefor. (Tr. 37).

Thereafter, on February 19, 1952, salesman Upson wrote and personally delivered to Ahearn (Upson, Tr. 38), a letter advising of approximate delivery dates on material for the Navy Yard job. This letter was received in evidence as plaintiff's Exhibit 6. With reference to telephone cable, it stated the following:

"Western Electric Telephone Wire 6 pr., 26 pr. & 51 pr. paper and sheath—3Q53.

"U. S. Rubber Latex Telephone Wire 6 pr., 26 pr. and 51 pr.—3Q52.

U. S. Rubber take exception to sub paragraph "B" under Paragraph 5-09 in that Mutual capacitance of their wire is .115 MFD instead of .090 as specified."

which confirmed the delivery date of paper wrapped telephone cable set forth in the Westinghouse Quotation (Pl. Ex. 3), that is 3rd Quarter 1953, but stated that latex cable could be delivered in 3rd Quarter 1952. Ahearn's attention was called to that fact but he paid no attention to the delivery dates of the different types of cable. (Ahearn, Tr. 181). In 1952 all copper wire was under government priority and there was a more acute shortage of paper wrapped cable than Latex cable. (Flechsigs, Tr. 85-86).

On this same day, Ahearn wrote a letter to the Navy officials administering the contract. This letter is in evidence as plaintiff's Exhibit 8. It for-

warded the Westinghouse letter, (Pl. Exhibit 6), to the Navy to advise Navy officials of the information on delivery dates (Ahearn, Tr. 182). The Navy's reply thereto, dated March 7, 1952, is in evidence as Pl. Exhibit 9. It authorized the use of U. S. Rubber latex telephone wire of the characteristics set forth in Exhibit 6, which could be delivered in the third quarter of 1952.

Three days later, on March 10, 1952, plaintiff's salesman, Upson, called on Ahearn at his shop in Bremerton (Upson, Tr. 43; Ahearn Tr. 154-155). The testimony as to what transpired on that date is in sharp conflict. Upson testified that he went to Ahearn's office in company with Novich, another Westinghouse employee, at which time he discussed with Ahearn and Arthur Rockwell, Ahearn's foreman, the fact that the paper wrapped cable could not be delivered until the third quarter, 1953, whereas the latex could be delivered in the third quarter of 1952. The existence in Ahearn's Navy contract, (Pl. Exhibit 18) of a liquidated damages clause fixing damages of \$40.00 a day was also discussed. Upson then left Ahearn's shop in company with Rockwell for a cup of coffee, and then returned without Rockwell, at which time Ahearn said: "let's get the wire," having previously been advised of the difference in price of roughly \$5,000.00. Upson testified that at the time Ahearn

made the statement: "let's get the wire," Novich was also present. (Upson, Tr. 43-48). Upson also testified, (Tr. 46), that at this time Ahearn changed the quantities of the different pair of wire due to changes on the job, ordering:

1800' of 6 pair latex cable  
1900' of 26 pair latex cable  
1250' of 51 pair latex cable

Novich testified to the same discussions and statements referred to by Upson regarding the ordering of latex cable and fixed the date of the conversation as March 10, 1949, by the fact that he received an order for certain lighting fixtures in Bremerton on that date (Novich, Tr. 91-94, and Def's. Ex. A-1). Mr. Lawrence Blackman, who worked for Ahearn during the period of the Navy Yard job, was examined as a witness for plaintiff. He testified to having been in the shop at a time when he heard Ahearn order latex covered wire from Upson, and identified Pl. Ex. 10 as an order which Upson started to write out at that time. He stated that he had seen a copy of Exhibit 10 in Mr. Ahearn's file (Blackman, Tr. 102-108). On cross-examination, defendants introduced Blackman's time book (Defendant's Exhibit A-2) which showed that on March 10, Blackman's time had been charged to the Navy Yard job. (Blackman, Tr. 123). Blackman testified that the time book would

show a charge to the Navy Yard job for certain work performed in the shop. (Blackman, Tr. 124-125). Ahearn testified that no work for the Navy Yard job was done in his shop and that defendant's Exhibit A-2 indicated that Blackman had been in the Navy Yard eight hours on March 10, 1952 (Ahearn, Tr. 153-154).

With reference to March 10, 1952, Ahearn testified that Upson and Novich came to his shop on that day at his request to estimate the materials for lighting a nearby grocery, and that he and Novich had checked the store's lighting needs and figured the cost of the lights and labor, (Ahearn, Tr. 154-157). Ahearn stated that there was no discussion relating either to a change from paper wrapped to latex telephone cable, (Ahearn, Tr. 159), or to a change in the lengths of the 3 types of cable, or to the contract involved in this suit. (Ahearn, Tr. 158). Mrs. Ahearn testified that she was in the shop on March 10, 1952, as indicated by entries in her handwriting in defendant Ahearn's cash journal (defendant's Exhibit A-8, Tr. 196-198) and that she heard no comment with reference to latex wire when Upson and Novich were in the store on that day. (Mrs. Ahearn, Tr. 201).

The testimony as to the remaining events is not in serious dispute.

On the afternoon of March 10, 1952, Upson wrote

up in long hand an order for latex telephone cable and on March 10th or 11th (Pl. Exhibit 10) personally mailed a copy to Ahearn (Upson, Tr. 44-48). Upson's copy of this order was received in evidence as plaintiff's Exhibit 10. On March 11, 1952, Westinghouse ordered latex cable from the local agency of the manufacturer, U. S. Rubber. The order was accepted by the factory on March 24, 1952. (Testimony of Mr. A. J. Flechsig, plaintiff's sales supervisor, Tr. 66).

On December 24, 1952 U. S. Rubber invoiced Westinghouse for the shipment of latex telephone cable to Ahearn Electric Company. The invoice showed shipment as having been made on December 20, 1952 (Pl. Ex. 15). On December 30, 1952, Westinghouse invoiced the latex telephone cable to defendant Ahearn. This invoice is in evidence as plaintiff's Exhibit 16.

Ahearn testified that he received Exhibit 16, probably on December 31, 1952 and that he had never prior to the receipt of that invoice discussed with Upson or any other employee of Westinghouse the substitution of latex for paper wrapped cable. (Ahearn, Tr. 160-161).

The latex cable was delivered to Ahearn on the job site at Puget Sound Naval Shipyard in January, 1953 (Finding of Fact IX, Tr. 19). Westinghouse's supervisor, Mr. Flechsig, testified that from in-

formation he had received, the date of delivery should have been January 6, 1952 (Flechsigs, Tr. 67).

On receipt of Exhibit 16, the invoice for latex cable, showing a price of \$7,646.29 in lieu of the price which Ahearn testified he had expected to pay for paper wrapped cable, approximately \$1800.-00, Ahearn called Rockwell and Rockwell called Flechsigs of Westinghouse (Ahearn, Tr. 162). As a result of that call, Upson came to Ahearn's place of business. Ahearn testified that he denied having ordered latex wire and that Upson asserted that Ahearn had ordered the wire. Ahearn stated that he would refuse to accept the wire. (Ahearn, Tr. 186). Ahearn testified that Upson suggested that Ahearn request a price increase on his contract. (Ahearn, Tr. 164-5). Thereafter, Ahearn addressed a letter, (Pl. Exhibit 20) to the Naval authorities supervising the government contract. This letter, dated January 8, 1953, informed the Navy that the telephone cable had been received but that it was not the type ordered for the contract, and requested an increase in the contract price to cover the difference between paper wrapped and latex cable.

The Navy reply thereto dated January 26, 1953, is in evidence as plaintiff's Exhibit 20 (a). It denied any increase in the contract price and points out that Section 5.09 of Specification No. 30338 (Defendants' Exhibit A-3) called for either paper

wrapped or latex insulated telephone cable. It went on to refer to previous correspondence, (Pl. Exhibits 6 and 8) in this case, as follows:

“Your letter further states that the material actually supplied by Westinghouse was not the material ordered. The Officer-in-Charge of Construction has on file a letter dated 19 February 1952 from your firm, which submitted a letter from Westinghouse Electric Supply Company dated 19 February, showing approximate delivery dates on material ordered for the subject contract. Several items have been covered in their letter and one of the items was the telephone cable in question, and that part is hereby quoted: ‘U. S. Rubber latex telephone wire 6 pr., 26 pr. and 51 pr.—3Q52. U. S. Rubber take exception to subparagraph ‘“b”’ under paragraph 5-09—that the Mutual capacitance of their wire is .115 MFD instead of .090 as specified’.”

The Navy letter went on to state that the contract completion date was then 28 October 1952, that consideration would be given to extending the contract completion date on the basis of delay in delivery of the material then on the job site, but that the liquidated damages provision of the contract would be invoked in the event of any further delay. It requested Ahearn to install the specified materials and complete the contract at the earliest possible date.

Prior to the time the telephone cable was finally installed, Ahearn filed a document with the Navy to obtain an advance of 90% on the value of the

material then located on the job site. This estimate document listed the price of the telephone cable as \$7,500.00. Ahearn received advance payment from the Navy based on that price (Rockwell, Tr. 137-138; Ahearn, Tr. 182-3).

The latex telephone cable was thereafter installed by Ahearn and Rockwell (Rockwell, Tr. 136-7). (Finding of Fact IX, Tr. 19-20). Ahearn testified that between February 5, 1952 when paper wrapped cable was ordered (Pl. Exhibit 4) and when latex cable was delivered to him in early January, 1953 he had no discussions at all with his foreman Rockwell about the cable (Ahearn Tr. 185).

Ahearn and his counsel were served with subpoena duces tecum to produce at the trial all of his records, invoices, letters and other documents in any way pertaining to the subject matter of the law suit. He was able to produce only 8 out of 18 of the yellow sheet acknowledgements of orders (Pl. Exhibit 14) (Flechsigs, Tr. 208-209) which Westinghouse mailed to him at the time each order was received. One of the ten missing is the acknowledgment covering the latex cable.

### **SPECIFICATIONS OF ERROR**

1. The District Court was clearly erroneous in finding and concluding that plaintiff was not entitled to recover on the theory of implied contract

(Finding of Fact No. XI, Tr. 23; Conclusion No. I, Tr. 24), for the reason that the evidence established the existence of a contract implied-in-fact.

2. The District Court was clearly erroneous in finding that defendant Ahearn did not benefit by his receipt and use of latex cable (Finding of Fact No. X.), and in finding and concluding that plaintiff was not entitled to recover on the theory of implied contract (Finding of Fact No. XI, Tr. 23; Conclusion No. I, Tr. 24), for the reason that the evidence established a contract implied-in-law.

3. The District Court erred in concluding that the complaint should be dismissed with prejudice (Conclusion No. II, Tr. 24) and entering judgment dismissing the complaint with prejudice (Tr. 25), for the reason that the uncontradicted evidence established the existence of all the facts entitling the plaintiff to recover under the statute, Title 40 U.S.C., Sec. 270b, 49 Stat. 794.

4. The District Court erred in concluding that the complaint should be dismissed with prejudice, Conclusion No. II, Tr. 24, and entering judgment dismissing the complaint with prejudice (Tr. 25).

5. The District Court erred in not entering judgment for the plaintiff for the principal sum of \$5,469.51, with interest from January 1, 1953, its costs, and a reasonable attorney's fee of \$1,500, as prayed for in the plaintiff's complaint, as amended.

# I. THE DISTRICT COURT ERRED IN FINDING AND CONCLUDING THAT THERE WAS NO CON- TRACT IMPLIED-IN-FACT FOR THE PURCHASE OF LATEX CABLE

## Summary of Argument

The evidence is undisputed that Ahearn received the latex cable with knowledge of the price thereof and used the cable in the performance of his contract with the federal government. Under the law of Washington which controls the transaction between Westinghouse and Ahearn, these circumstances give rise to a contract implied-in-fact.

## Argument

1. *The transaction between Ahearn and Westinghouse is governed by the law of the State of Washington.*

In *Continental Casualty Co. v. Schaefer*, 173 F. 2d 5 (9th Cir. 1949), cert. den. 338 U. S. 820, 94 L. Ed. 479, 70 Sup. Ct. 35 (1949), this Court held that the liability of a contractor for labor and materials furnished in the performance of a federal contract in the State of Washington in a Miller Act suit, was governed by Washington law, although jurisdiction was conferred by the Miller Act rather than by diversity of citizenship. The court said at p. 8:

“\* \* \* we should decide this issue as would a State court sitting in Washington. Since all the relevant facts regarding this subcontract

have occurred in Washington, the Washington substantive law of contracts is applicable."

See also *United States v. Henke Construction Co.*, 157 F. 2d 13 (C. C. A. 8, 1946).

*2. Acceptance and use of goods with knowledge of the price thereof gives rise to an implied contract to pay that price under Washington law.*

The defendants have contended throughout that there was no express contract for the purchase of latex telephone cable from Westinghouse by Ahearn, and the District Court so found. (Finding of Fact No. XI, Tr. 22-3.) That being the case, the defendants' position must be that Ahearn may receive, retain and use the latex cable, with knowledge of its price and value, without paying such price. Under Washington law, it is clear that he may not do so but that such dealings give rise to a contract implied-in-fact.

*Mutual Sales Agency v. Hori*, 145 Wash. 236, 259 Pac. 712 (1927), is very similar to the instant case in many respects. In that case there was a misunderstanding between seller and buyer as to the price and grade of potatoes ordered from the former by the latter. The court assumed that the buyer was correct in his contention that a contract had been formed for the sale of the lower grade of potatoes at a lesser price, but held that where the higher

grade was accepted and retained by the buyer with knowledge that the seller was demanding the higher price, the buyer could not accept the potatoes, obtain possession of them by paying the sight draft attached to the bill of lading and then recover back the difference between the price asserted by it and the price invoiced by the seller and actually paid. This case is cited in 1 *Williston on Sales* (Rev. Ed.), Sec. 5 (a), p. 10, for the following proposition:

“Accepting the property in goods with knowledge that they are offered at a certain price indicates a promise to pay that price.”

In *Cuschner v. Pittsburgh-Hickson Co.*, 91 Wash. 371, 157 Pac. 879 (1916) the buyer brought an action to recover damages for an alleged breach of contract by the seller. One of the claims sued upon was to recover money paid for goods shipped and paid for, but not ordered by the buyer. In disposing of this claim the Washington Supreme Court said, at p. 373:

“Before the appellant can recover for the goods claimed to have been received but not ordered, it is necessary for him to show that, within a reasonable time after the receipt of such goods, he rejected the same, and so notified the respondent. The evidence fails to show any such notice. On the other hand, there is evidence that at least goods of this class to the extent of \$50 were sold out of the appellant's store by one of his salesmen. This was an act of ownership on the part of the purchaser which would be inconsistent with the right of

ownership on the part of the seller, and would constitute an acceptance of the merchandise, even though not ordered."

It should be noted that in both of the above cases, the buyer had to pay the seller's price to obtain the goods, and was suing to recover back part of the amount so paid. In the instant case, the buyer, Ahearn, did not have to pay to obtain the goods because the goods shipped to him for the prosecution of his government contract were carried by Westinghouse on a "job account," the ledger sheet on which is in evidence as Plaintiff's Ex. 17. Under the terms of this account, Ahearn had ninety days in which to pay Westinghouse after being paid by the government (Ahearn, Tr. 150). Can it be doubted that Westinghouse was relying on the protection of the Miller Act, and the bond of Ahearn and Aetna, in permitting Ahearn to take possession of the goods?

In *Koths v. Shagren*, 38 Wn. (2d) 52, 227 P. (2d) 446 (1951), the seller's assignee brought suit for the invoice price of groceries furnished to the defendant, alleging an express contract to pay such invoice price. There was no evidence of any express promise or agreement by the buyer to pay nor was there evidence as to the market or reasonable value of the goods. The Washington Supreme Court held that one alleging an express contract could recover on a showing of the foregoing facts establishing the ex-

istence of an implied contract and further, that when a buyer receives goods with knowledge of the price demanded by the seller, he is bound to pay that price, stating at p. 54:

“This is because the price given represents that at which the seller is willing to sell and the acceptance of the goods without protest implies willingness to buy at that price.”

Textual authorities are in accord with the propositions established in these Washington cases. In 1 *Williston On Contracts* (Rev. Ed.), Sec. 36A, pp. 96-97, the following statement is made with reference to offers implied in fact:

“A seller may make an offer of goods which is accepted by taking them with knowledge that payment is expected, or a request for goods may imply a promise to pay for them, which is accepted by delivering them. Similarly, *if goods of a different sort from those ordered are sent by a seller, he thereby impliedly makes an offer to sell which is accepted if the buyer takes the goods.*” (Emphasis supplied)

Defendants' answer in the court below to plaintiff's proof of a contract implied-in-fact was a reference to the Washington case of *Ross v. Raymer*, 32 Wn. (2d) 128, 201 P. (2d) 129 (1948), which holds that in order to permit a recovery on the theory of a contract implied-in-fact for services rendered to a deceased in a suit against her executrix, it must appear that the services were rendered un-

der circumstances indicating that the person rendering them did so with the expectation of being paid and that the decedent expected or should have expected to pay for them. Plaintiff has no quarrel with this proposition. Defendants argue therefrom that because Ahearn consistently maintained that he would not pay for the latex cable, he never became a party to an implied-in-fact contract. We think the cases previously cited are a sufficient answer to this argument. However, attention is also invitted to the case of *Western Asphalt Co. v. Valle*, 25 Wn. (2d) 428, 171 P. (2d) 159 (1946), in which it was held that a subcontractor furnishing an estimate for a part of the work to a prime contractor bidding on a government contract was entitled to go to the jury on the theory of a contract implied-in-fact to pay the reasonable value of the plaintiff's services in preparing the estimate, although the entire evidence on behalf of the principal contractor was that it never expected or intended to pay for such services.

The law of other jurisdictions is similar. In *Royal Card and Paper Co. v. Dresdner Bank*, 27 F. (2d) 791 (C. C. A. 2, 1928) plaintiff-buyer sued a correspondent bank for damages for breach of the buyer's contract with the bank because the bank made payments against the plaintiff's letter of credit on invoices not in conformity with the plaintiff's in-

structions. The invoice price in some instances exceeded the order price, and in other cases goods were invoiced which had not been ordered. It was shown that the plaintiff had accepted and retained the goods shipped and paid for by the defendant bank in violation of the instructions. The Second Circuit Court of Appeals held that by accepting the goods with knowledge of the invoice price and asserting control over them, the plaintiff accepted the new contract. The court said at p. 795:

“Excess shipments and shipments unauthorized in other respects gave plaintiff the privilege of rejection but if it accepted the goods it was obliged to pay the invoice price.”

Viewing the transaction from a Sales aspect, Washington law requires a similar result. Since it is undisputed on this appeal that there was no express contract for the purchase of latex telephone cable, and the cable having been delivered by Westinghouse and accepted and retained by Ahearn, under well-recognized principles of the law of Sales, an implied-in-fact contract arose. In 1 *Williston on Sales* (Rev. Ed.), Sec. 5 (a), p. 10, it is stated:

“Accepting the property in goods with knowledge that they are offered at a certain price indicates a promise to pay that price. So that where goods which have not been ordered are sent and the buyer takes the goods, he impliedly agrees to pay for them.”

Sec. 9 of the *Uniform Sales Act* (Laws of Wash.

1925 ex. s. c. 142, Sec. 9, RCW 63.04.100), provides in part, as follows:

“(1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

\* \* \* \*

(3) Where the price is not so fixed or determined the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.”

See, e. g., *Estey Organ Co. v. A. & E. Lehman*, 132 Wis. 144, 111 N. W. 1097 (1907); *Mummenhoff v. Randall*, 19 Ind. App. 44, 49 N. S. 40 (App. Ct. 1898); *Peerless Glass Co. v. Pacific Crockery & Tin Ware Co.*, 121 Cal. 641, 54 Pac. 101 (1898).

Where goods are delivered to the buyer without an agreement as to price, the measure of recovery under the Sales Act is the reasonable price. *Chicago Macaroni v. Grossi*, 349 Ill. App. 539, 111 N. E. (2d) 357 (App. Ct. 1953).

## II. THE DISTRICT COURT ERRED IN FINDING AND CONCLUDING THAT PLAINTIFF WAS NOT ENTITLED TO RECOVER ON THE THEORY OF A CONTRACT IMPLIED-IN-LAW OR QUASI CONTRACT

### Summary of Argument

The District Court found that defendant Ahearn received no benefit from the receipt of latex telephone cable. The uncontradicted evidence establishes substantial benefit to Ahearn from receipt of the cable. His intention not to pay the value thereof does not prevent formation of a quasi contract. Plaintiff was therefore entitled to recover the unpaid balance of the invoice price on the theory of quasi contract or contract implied-in-law.

### Argument

#### *1. Ahearn benefited from the receipt and use of the latex telephone cable.*

The evidence established without contradiction that subsequent to receipt of the Navy letter of January 26, 1953 (Pl. Ex. 20A) Ahearn completed his government contract by installing latex telephone cable (Rockwell Tr. 135-8). It is the argument of defendants that because the Navy denied Ahearn an increase in his contract price he did not benefit from the receipt of the latex cable, and the District

Court so found. (Finding of Fact No. X, Tr. 20.) This finding is clearly erroneous.

Plaintiff does not dispute that defendant Ahearn would have received the same payment under his government contract for paper-wrapped cable if that had been available to him at the time the latex cable was delivered. In fact, the use of either was authorized. It is clear, however, that Ahearn had no contract right to receive paper-wrapped cable at that time; and it is equally clear that paper-wrapped cable would not have been available to him until at least the third quarter of 1953 from any source. The receipt of the latex cable enabled him to complete his government contract and receive payment therefor, and was of benefit to him beyond any possibility of question.

The only evidence in this record as to the availability of paper-wrapped cable is contained in plaintiff's Exhibits 3 and 6, and shows that it would not have been available until the third quarter of 1953. Mr. Flechsig testified that manufacturers were not permitted to maintain stocks. (Flechsig, Tr. 78.) Ahearn testified that Upson had told him he could get it in time for Ahearn to perform his contract but that statement was denied by Upson. If Ahearn had not accepted and used the latex telephone cable, plaintiff's Exhibit 20A shows that Ahearn would have been exposed to liquidated damages under his

government contract at the rate of \$40.00 per day for whatever time it took him to obtain paper-wrapped cable. It is difficult to conceive how, under the foregoing facts, it can be maintained that Ahearn received no benefit.

In addition, although Ahearn's total government contract price was not increased, he benefited from receiving approximately 90% of the price of the latex in advance of completing the work, when he claimed and received an estimate payment based on the invoice price of the latex. (Ahearn, Tr. 182-3.)

Moreover, the mere receipt and use of the latex cable, which he had no express contract to receive, constituted a benefit, disregarding the fact that it enabled him to complete and receive payment under his government contract. *Restatement of the Law of Restitution*, Sec. 1b, under the heading "What Constitutes a Benefit," defines "benefit" as follows:

"A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss."

In *Mutual Sales Agency v. Hori*, 145 Wash. 236, 259 Pac. 712 (1927) (discussed under Argument No.

I, *supra*), the buyer argued that it was under compulsion to pay the price demanded by the seller for higher grade potatoes because it had resold them prior to arrival and then was forced to take the goods to make good its contracts of sale for the lesser grade. There was no showing that it received a greater price from the resale of the higher grade potatoes. The Washington Supreme Court held that that circumstance did not relieve it from the consequence of its act in accepting and retaining the goods.

*Great Lakes Construction Co. v. Republic Creosoting Co.*, 139 F. (2d) 456 (C. C. A. 8, 1943), a case under the Heard Act, former Title 40 U. S. C. Sec. 270, is remarkably similar to the instant case in this respect. That was a suit by a subcontractor against the prime contractor and the surety on his bond. There was originally a contract between the contractor and the subcontractor for the performance of the work of flooring a building being constructed for the government. The prime contractor failed to have the building ready for the flooring work within the time required by the subcontract and the subcontractor therefore claimed that it was released from the obligation of performing under its contract. The prime contractor insisted that the contract was still in existence and that the subcontractor was required to perform for the contract

price. The prime contractor undertook the work itself, insisting on his right to hold the subcontractor for the excess cost thereof. After performing a part of the work the prime contractor discontinued work on the flooring and the work was taken over and completed by the subcontractor. At that time both parties were still insisting upon their positions, the prime contractor that the subcontractor was still obligated to perform for the original contract price, and the subcontractor that the original contract had been breached because of failure to provide a site at the time agreed upon, and the purpose of the subcontractor's assuming performance was to diminish the amount in controversy and reserve the rights of the parties for future adjudication. The court held the conduct of the parties after such breach to have amounted to an abandonment of the original contract,

“\* \* \* and that the Republic Creosoting Company, having furnished material and labor which was accepted and received by the Great Lakes Construction Company and used and employed in the United States Post Office, is entitled to have and recover in quantum meruit the reasonable value of such labor and material at the time the same was furnished, together with interest at 6% per annum from the date of the filing of its intervening petition in this action.” (139 F. (2d) at p. 464)

The Appellate Court further found:

“\* \* \* the acceptance of the work and material furnished by Republic upon the understanding

detailed in the findings justified and required the recovery upon the quantum meruit which was awarded." (p. 464)

2. *Defendant Ahearn's refusal to pay does not prevent formation of a quasi contract under Washington law.*

The Washington law of contracts implied-in-law or quasi contract was exhaustively reviewed in the case of *Chandler v. Wash. Toll Bridge Authority*, 17 Wn. (2d) 591, 137 P. (2d) 97 (1943). The court there defined a contract implied in law as follows, citing a prior Washington decision:

"A contract implied in law is an obligation imposed upon a person by the law, not in pursuance of his intention and agreement, either express or implied, but found against his will and design, because the circumstances between the parties are such as to render it just that one should have a right and the other a corresponding liability similar to that which would arise from a contract between them. This kind of obligation rests upon the principle that whatsoever it is certain a man ought to do, that the law will suppose him to have promised to do." (pp. 600-601)

No reason has been suggested why as between plaintiff and defendants, defendants should be relieved of the liability to pay the reasonable value of the goods which Ahearn received, retained and used in the performance of his contract with the government. It is nowhere contended in this record that the Westinghouse invoice for the latex cable

was greater than its reasonable or market value. Ahearn himself testified that he knew latex cable cost about three times as much as paper-wrapped cable (Ahearn, Tr. 180). Rockwell testified that he never considered latex cable for the job because of the price thereof (Tr. 132). Plaintiff's Exhibit 15, showing the cost of the latex cable taken together with its invoice to Ahearn (Pl. Ex. 16) shows that its mark-up over the manufacturer's price was only 5%.

### III. ALL FACTS REQUIRED TO ENTITLE PLAINTIFF TO RECOVER UNDER THE MILLER ACT (TITLE 40, U.S.C., SEC. 270 b) WERE ESTABLISHED BY THE UNDISPUTED EVIDENCE

#### Summary of Argument

The Miller Act does not require a laborer or materialman to prove a contract, in the conventional sense, to recover on the prime contractor's payment bond. All that is required is proof that the use-plaintiff has furnished work or materials in the prosecution of the work, and has not been paid therefor.

#### Argument

In defining the rights it confers, the Miller Act does not require a laborer or materialman to prove a contract in order to recover. Sec. 2 (a) of the Act provides as follows: (Title 40 U. S. C. Sec. 270b (a)):

"Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of

institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: PROVIDED, HOWEVER, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor \* \* \*"

Moreover, the payment bond furnished by Aetna and Ahearn (Pl. Ex. 18) was conditioned that:

"If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, . . . then this obligation to be void; otherwise to remain in full force and virtue."

Thus, it may be seen that the Act protects not those who contract with the prime contractor, but those who *furnish* labor and materials in the prosecution of the work, with the further proviso that those having a contractual relationship with a subcontractor must give notice within ninety days, so that the prime contractor may be protected in making full payment to his subcontractors after that time.

In *MacEvoy v. United States*, 322 U. S. 102, 88 L. Ed. 1163, 64 Sup. Ct. 890 (1944), the Supreme Court defined those protected by the Miller Act as being of two classes:

“(1) those materialmen, laborers and sub-contractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor.” (322 U. S. at 107-8)

In that case, the use-plaintiff had supplied material to a materialman who dealt with the prime contractor. The Circuit Court held the plaintiff entitled to recover under the first portion of the section. *United States v. MacEvoy*, 137 F. (2d) 565 (3d Cir. 1943). The Supreme Court held a materialman not to be a subcontractor within the meaning of the proviso of the section, and that therefore the use-plaintiff, having neither “dealt with” the prime contractor, nor had a “contractual relationship” with a subcontractor, could not recover on the bond. 322 U. S. 102, *supra*.

Under the predecessor statute, the Heard Act, former title 40 U. S. C. Sec. 270, 28 Stat. 278 as amended, this Court held an action could be maintained by a materialman on the payment bond against the surety without joining the principal. A District Court order denying the surety’s motion to join the contractor-principal was affirmed. *Seaboard Surety Co. v. United States*, 84 F. (2d) 348 (C. C. A. 9, 1936)

*Ross Engineering Co. v. Pace*, 153 F. (2d) 35 (C.

C. A. 4, 1946), is closely in point. Here a number of actions were consolidated in one Miller Act proceeding. Case No. 5416, reported therein, beginning at page 43, involved the claim of a sub-subcontractor against the prime contractor for the cost of repairing damage to a road base built by the sub-subcontractor. The complaint alleged an express contract to pay the expense of repair. The Court of Appeals affirmed a jury verdict for the plaintiff, not on the ground of any express agreement, but on the theory that the damage was done by the prime contractor or persons under his control. The Court said:

“It follows that a promise to pay for the benefits conferred should be implied. The situation is akin to that which occurs when one accepts goods or services from another who expects payment for them. It is urged upon us that no intention to pay for the roads can be attributed to Ross in this case in the face of its vigorous denial of all liability.”

See also *Great Lakes Construction Co. v. Republic Creosoting Co.*, 139 F. (2d) 456 (C. C. A. 8, 1943), discussed in Argument No. III, *supra*.

In *Continental Casualty Co. v. Schaefer*, 173 F. (2d) 5 (9th Cir., 1949), a Miller Act case, this Court reviewed the facts and contentions of the parties, a use-plaintiff subcontractor, and the defendants, prime contractor and his surety, and found that the use-plaintiff had furnished labor and materials in the prosecution of the work under the contract, and

had not been paid therefor, which entitled him to recover. This Court said (173 F. (2d) at 8) that it did not matter whether the subcontractor's rights were based on a contract implied-in-fact, a quasi contract, or on promissory estoppel, and it further held the measure of the plaintiff's recovery to be "the reasonable value of the work and materials furnished plus overhead and profit." (173 F. (2d) at 9.)

Appellant does not argue that the Miller Act creates mysterious and unique rights. The statute clearly sets forth the elements which must be shown to entitle a plaintiff to recovery. This Court in *Continental Casualty Co. v. Schaefer*, 173 F. (2d) 5, *supra*, finding the statutory elements to be proven, did not concern itself with the dialectic of whether the plaintiffs' rights sounded in one theory or another. The Court of Appeals for the Fourth Circuit, in *Ross Engineering Co. v. Pace*, 153 F. (2d) 35, (C. C. A. 4, 1946), *supra*, held that a contract implied in law arose on proof by the plaintiff of the elements set forth in the statute.

Here, there is no dispute that the latex cable was furnished in the prosecution of the work (Finding of Fact No. X, Tr. 20), nor that there is a balance of \$5,469.51, which was the difference in price between latex and paper-wrapped cable, unpaid (Pl. Ex. 17) on the invoice price thereof (Pl. Ex. 16).

All facts required to support a judgment under the statute were therefore proven by undisputed evidence, and in fact were not denied at the trial.

#### IV. THE DISTRICT COURT ERRED IN ENTERING JUDGMENT DISMISSING THE COM- PLAINT WITH PREJUDICE

##### Summary of Argument

In rationalization of the District Court's judgment, it may be argued that Ahearn had a contract right to receive paper-wrapped cable, and that his damages for breach of that contract would approximate the amount sued for by plaintiff. There was no contract for delivery of paper-wrapped cable in the third quarter of 1952, and the District Court did not find that there was. If there had been, and Ahearn was damaged by a breach of that contract (which was not alleged or proven), that fact would not entitle defendants to a judgment dismissing plaintiff's complaint.

##### Argument

##### 1. *There was no contract for third quarter 1952 delivery of paper-wrapped cable.*

It is supposed that defendants-appellees will contend that there was a contract for the delivery by Westinghouse to Ahearn of paper-wrapped telephone cable in the third quarter of 1952. The sole evidence to that effect is the testimony of Ahearn himself as to the statements of Upson claimed to have been made on January 31, 1952 (Ahearn, Tr.

149-50). The statement of the case in this brief discusses fully the evidence, oral and documentary (Pl. Ex. 3, 6, 8, 9, 20A, 21 and 22) which rebut this assertion. The District Court did not find that there was a contract for the delivery of paper-wrapped cable before the third quarter, 1953. He found,

“Some one among the witnesses is obviously and knowingly not telling the truth, and I do not know who it is.”

And,

“This Court can come to but one conclusion, and that is that the plaintiff in this case has failed to sustain the plaintiff’s burden of proof in support of the cause of action alleged in plaintiff’s complaint.” (Finding of Fact No. XI, Tr. 20, 22-3)

Discarding the evidence on behalf of Westinghouse that Ahearn ordered the latex cable, the situation at the time Ahearn learned of the delivery of the latex cable, and its invoice price, was that there was a contract for third quarter 1953 delivery of paper-wrapped cable (which contract has been abandoned by the parties), or else, taking the most favorable possible view of the evidence from the standpoint of defendants-appellees, there was no contract for paper-wrapped cable, as a result of a mutual mistake of fact as to time for delivery, Ahearn believing he had contracted for third quarter 1952 delivery, and Westinghouse believing it had contracted for third quarter 1953 delivery.

2. *The existence of a contract for delivery of paper-wrapped cable in the third quarter 1952 would not entitle defendants-appellees to judgment in this action.*

Assuming in the face of the overwhelming evidence to the contrary, that Ahearn had a contract right to receive paper-wrapped cable in the third quarter of 1952, that fact would not be a defense to plaintiff's suit. If Westinghouse had breached a contract for delivery of the paper-wrapped cable, it is elementary that Ahearn's remedy would have been an action for damages for breach of that contract. In this action, Ahearn neither pleaded such a contract nor filed a counterclaim, and proved no damages resulting from such breach.

Again the case of *Mutual Sales Agency v. Hori*, 145 Wash. 236, 259 Pac. 712 (1927) (discussed under Argument I(1)) is in point. The Washington Supreme Court there assumed that the seller had breached his contract for delivery of potatoes of a lesser grade and price, but reversed the trial court's judgment permitting the buyer to recover the difference in price between the two grades of potatoes, because the buyer had not sued for breach of the contract for the cheaper grade of potatoes. (145 Wash., 240-241)

## V. THE DISTRICT COURT ERRED IN NOT ENTERING JUDGMENT FOR PLAINTIFF

### Summary of Agreement

Plaintiff having established by uncontradicted evidence its right to recover in this action, the District Court should have entered judgment granting the relief prayed for.

### Argument

Having proven the existence of a contract implied-in-fact (Argument No. I) plaintiff was entitled to recover the balance due on the invoice price of the latex cable, which balance is shown by Plaintiff's Exhibit 17, and is not denied by defendants. If plaintiff's right to recover is held to rest in quasi-contract (Argument No. II), or on proof of the facts required to recover under the Miller Act (Argument No. III), then the invoice price was shown to be the reasonable value of the cable. Rockwell testified he knew latex cable was over \$5,000.00 more expensive than paper-wrapped (Rockwell, Tr. 134). Ahearn testified he knew latex cost three times as much as paper-wrapped (Ahearn, Tr. 180). Westinghouse's markup over the manufacturer's price was only 5%. (Pl. Ex. 15 and 16.)

Plaintiff was also entitled to interest from January 1, 1953, at the rate of 6%. The plaintiff in a Miller Act suit is entitled to interest on the price of his

labor or materials, if the state in which the labor or materials were furnished accords a right to interest in such an instance. *Continental Casualty Co. v. Boyd*, 140 F. (2d) 115 (C. C. A. 10, 1944); *United States v. Henke Construction Co.*, 157 F. (2d) 13 (C. C. A. 8, 1946). The statutes of Washington provide for interest at the rate of 6% on liquidated demands where no other rate has been fixed between the parties. L. Wash. 1899, C. 80, Sec. 1, R.C.W. 19.52.010.

The expense of obtaining certified copies of the contract and bond, in the amount of \$7.00 (Pl. Ex. 19) is recoverable as a necessary and reasonable expense.

Plaintiff is also entitled to recover a reasonable attorney's fee in this action. The Miller Act was intended to afford those furnishing labor and materials for the prosecution of government work protection analagous to state mechanics' and materialmen's lien statutes in the case of private construction. *United States v. Gibson*, 192 F. (2d) 999, (4th Cir., 1951). Where the local statute provides for attorney's fees in a materialmen's lien foreclosure, attorney's fees are allowed in a Miller Act suit. *United States v. Breeden*, 110 Fed. Supp. 713 (D. C. Alaska, 3d Div., 1953). The Washington statute allows attorney's fees. L. 1893 c. 24, Sec. 12; R.C.W. 60.04.130. The prayer of the complaint, as

amended (Tr. 9-10) is for \$1,500.00 as attorney's fees. It is submitted that this amount is reasonable and proper in a suit to recover the principal sum of \$5,469.51, where the trial consumed three days, and where five lengthy pre-trial depositions were taken. (Documents 10-14, Record on Appeal.)

### CONCLUSION

Appellant has analyzed the testimony at length, and has advanced several legal theories entitling it to prevail in this action. What is fundamentally simple has been made to appear complex. Therefore in closing this brief, appellant would like to revert to the basic factual outline of this litigation. Westinghouse shipped latex telephone cable to Ahearn, who received the cable, and an invoice showing its price. There was no contract between them for the sale of latex cable. Ahearn accepted and used the cable, and has paid \$5,469.51 less than the price shown on the invoice. He and his surety now seek to avoid liability for the balance. That is the case.

Respectfully submitted,

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